No. 86-1915

(3)

Supreme Court, U.S.
FILED
JUN 29 1987
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

BOHEMIAN CLUB,
Appellant,

VS.

FAIR EMPLOYMENT AND HOUSING COMMISSION, STATE OF CALIFORNIA; DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING; and MARK GUERRA, as Director,
Appellees.

On Appeal from the Court of Appeal of the State of California

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

WILLIAM I. EDLUND
MICHAEL H. SALINSKY
COUNSEL OF RECORD
KEVIN M. FONG
225 Bush Street
Mailing Address
P.O. Box 7880
San Francisco, CA 94120
Telephone: (415) 983-1462
Counsel for Appellant

PILLSBURY, MADISON & SUTRO
225 Bush Street
Mailing Address
P.O. Box 7880
San Francisco, CA 94120
Of Counsel

TABLE OF AUTHORITIES

Pages

Cases

Board of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 107 S.Ct. 1940, ___ U.S. ___ 7

EEOC v. St. Joseph Hospital East Inc., 19 FEP Cases 1439 4

Hishon v. King & Spaulding, 467 U.S. 69 7

Kemerer v. Davis, 520 F.Supp. 256 3

Norwood v. Harrison, 413 U.S. 455 7

Railway Mail Assn. v. Corsi, 326 U.S. 88 7

Roberts v. United States Jaycees, 468 U.S. 609 ..... 7, 8

Runyon v. McCrary, 427 U.S. 160 7

Shaw v. Delta Air Lines, Inc., 463 U.S. 85 ..... 3, 4

Pages

Statutes

Civil Rights Act of 1964
  Title VII
    Section 701(b),
      42 U.S.C. § 2000e(b) 3
    Section 708,
      42 U.S.C. § 2000e-7 2

  Title XI
    Section 1104,
      42 U.S.C. § 2000h-4 ..... 2, 3

No. 86-1915

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

BOHEMIAN CLUB,
Appellant,

VS.

FAIR EMPLOYMENT AND HOUSING COMMISSION, STATE OF CALIFORNIA; DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING; and MARK GUERRA, as Director,
Appellees.

On Appeal from the Court of Appeal of the State of California

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

This Court has jurisdiction, and the questions are substantial. Each of the courts below recognized that this case involves "novel and complicated issues" of "great importance" (Jur.St. Appx.A, p. 22; Clerk's Transcript on

Appeal, p. 1055). The Commission also recognized below that the case involved "complex and novel issues" (Commission Cross-Response Brief on Appeal, p. 16) and only now claims that the questions are "unsubstantial" in its attempt to avoid coming to grips with these crucial issues--Title VII preemption, freedom of association, and the standard of review.

Title VII preemption. The Commission does not dispute the need for this Court to clarify whether Title VII's preemptive scope is governed by the express preemption provision in § 1104 of Title XI, in conjunction with § 708 of Title VII. Instead, the Commission suggests that § 1104, if applicable, would not preempt the California employment discrimination law, as applied to private clubs (Mot., pp. 9, 10). The Commission ignores,

however, the critical language of § 1104--that all state laws "inconsistent with any of the purposes of * * * any provision" of the Civil Rights Act of 1964 are preempted (42 U.S.C. § 2000h-4). The Commission does not, and cannot, dispute the fact that the purpose of § 701(b) of Title VII was to protect the freedom of association of private club members. Laws regulating employment by bona fide private clubs are inconsistent with the purpose of § 701(b) and may not stand (Kemerer v. Davis (E.D.Mich. 1981) 520 F.Supp. 256, 258).

Quoting dictum in Shaw v. Delta Air Lines, Inc. (1983) 463 U.S. 85, the Commission asserts that states may impose requirements beyond the scope of Title VII and that Title VII is "neutral" in those areas not covered by its terms (Mot., p. 8). The Commission

ignores that Shaw recognizes that Title VII allows only "nonconflicting state laws" (463 U.S. 101; emphasis added). Here, there is a clear conflict between the Commission's application of the California law to private clubs and the congressional intent in Title VII to "preserve social and fraternal organizations of self-controlled membership as a refuge for private associational values" (EEOC v. St. Joseph Hospital East Inc. (W.D.Tenn. 1979) 19 FEP 1439, 1440).

Freedom of association. The Club's argument is simple: The freedom of association guarantees the right of members to define the Club's purposes and to conduct their own private, social activities without governmental intrusion. The government may not intrude into the Club's autonomy as reflected in the selection of employees involved in

the Club's private, social, associational activities.

The Commission attempts to deflect this important issue by misdirecting the Court's attention to the allegedly "inherently commercial" employment relationship between the Club and its employees (Mot., p. 6).[1] What is critical, however, is the fact that the members "enjoy a right of intimate association" (Mot., p. 6) and, accordingly, the Club's all-male activities

---

1 In any event, the Commission's assertion that employees are hired unselectively (Mot., pp. 3-4) is erroneous. For example, one of the Club managers testified that he hired only employees who were "responsible and have proper attitude" and "the most important thing" was that employees be able to "get along" with all the members (Admin.Record, pp. 476, 477). The Commission's own witness testified that the Club notifies the union of the individuals the Club did not wish to employ (Admin.Record, p. 113).

are protected by the freedom of association. The label given by the Commission to the nature of the employment relations is irrelevant. By compelling the presence of women throughout the Grove,[2] the State has intruded into the pro-

---

2 It is no answer that the Court of Appeal suggested that the Club may be able "'to demonstrate that male gender is a BFOQ [bona fide occupational qualification] for particular employment positions'" (Mot., p. 5). The Club has demonstrated and the trial court found that male gender is a BFOQ for all positions at the Grove and all positions in question at the City Club (Jur.St. Appx. C, p. 30).

> "Because of the frequency and the pervasive nature of the all-male associational activities at the Club, employees are present during, integrally involved with, and, in some instances, participate in those activities. The performance of duties and work assignments of the male employees could not be rescheduled, altered, or reorganized to avoid impact and effect upon the Club and members' associational activities * * *" (Jur. St. Appx. C, p. 38).

tected "intimate" membership activities and relationships. As the trial court found (Jur.St.Appx. C, pp. 37-38), the presence of women (either employees or non-employees) would destroy the purpose of the Club's existence--male fellowship and participation in the arts in a men-only environment.[3]

---

3 Unlike Roberts v. United States Jaycees, Board of Dirs. of Rotary Int'l v. Rotary Club of Duarte, and Hishon v. King & Spaulding, discussed in the Jurisdictional Statement, this case presents the archetypical bona fide, non-profit, private club. In each of the other cases cited by the Commission, this Court was not faced with the constitutional rights of truly private associations (Norwood v. Harrison (1973) 413 U.S. 455, 467 (state aid to private schools); Railway Mail Assn. v. Corsi (1945) 326 U.S. 88, 94 (organization functioning under protection of state); Runyon v. McCrary (1976) 427 U.S. 160, 167, 172, n. 10 (schools with public constituency)).

On the compelling interest issue, it is significant that the Commission makes no attempt to show that the statute has been drawn with constitutionally required narrow specificity (Jur.St., p. 17). To the contrary, the Commission's interpretation is "untested" (Commission Cross-Response Brief on Appeal, p. 16), and the ruling below concedes that the application of the California law to the Club is "ambiguous" and "not clear" (Jur.St.Appx. A, p. 4).[4]

---

4 Even assuming the State's general interest in dealing with employment discrimination, the Commission has failed to explain how that interest "justifies the impact that application of the statute to [the Club] may have on the male members' associational freedoms" (Roberts v. United States Jaycees (1984) 468 U.S. 609, 623; emphasis added).

Independent review. The Commission virtually concedes that a state court must make an independent review of the administrative record in determining whether a statute violates the freedom of association. The Commission cannot explain away the Court of Appeal's erroneous rejection of the trial court's independent review of the record. The Court of Appeal's opinion expressly holds that Club members' associational rights "do not rise to the level of fundamental vested interests for which an independent judicial evaluation and judgment [of the administrative record] are traditionally required" (Jur.St.Appx. A, p. 7).

Moreover, the Commission does not dispute the fact that the Court of Appeal itself refused to make an independent examination of the record, as constitutionally required (Jur.St.,

pp. 19-20).[5] The Commission's need to obscure the standard of review applied below highlights the errors by the Court of Appeal and confirms that plenary review by this Court is necessary.

Respectfully submitted,

WILLIAM I. EDLUND
MICHAEL H. SALINSKY
Counsel of Record
KEVIN M. FONG

Counsel for Appellant

PILLSBURY, MADISON & SUTRO
Of Counsel

---

5 The trial court found under the independent review standard that Club members' freedom of association would be drastically affected by the presence of female employees (Jur.St.Appx. B, pp. 37-38). While the Court of Appeal recognized that the relationship among members is "undoubtedly" intimate (Jur.St.Appx. A, p. 10), the Court of Appeal simply ignored the trial court's finding that members' associational activities would be drastically affected by the presence of women. Despite the fact that the Court of Appeal was not faced with a pure "legal question" (Mot., p. 17), it made no independent review of the record on this point.